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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

CITY OF KENOSHA, et al.,

Appellants,

vs.

PETER G. BRUNO, et al.,

Appellees.

MOTION TO AFFIRM JUDGMENT OF DISTRICT COURT

Now come the appellees, Richard Misurelli, Terrance McCue and David Robers by their attorney, Victor C. Cairo, and move the Court for an order affirming the judgment of the District Court for the Eastern District of Wisconsin upon the following grounds:

1.

That the judgment sought to be reviewed by this court raises issues and questions which are unsubstantial and require no further argument or consideration by the court.

2.

That the issues raised by the appellees have been fully considered and decided by numerous decisions of this court.

3.

That the decisions of the Circuit Court are not in conflict on the issues raised by appellants and sustain judgment of the District Court.

That this Motion to Affirm is based on the brief of the appellees filed herewith.

Dated this 15th day of November, 1972.

Victor C. Cairo
Attorney for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

CITY OF KENOSHA, et al.,

Appellants,

vs.

PETER G. BRUNO, et al.,

Appellees.

APPELLEES' BRIEF ON MOTION TO AFFIRM JUDGMENT

QUESTIONS PRESENTED FOR REVIEW

1.

May the officials of the State of Wisconsin who have granted a liquor license to a citizen, who on the expectation that such license will be renewed makes substantial investments in his business, terminate such renewal license without a procedural due process hearing?

2.

May the State of Wisconsin terminate the benefit of such license without affording the citizen:

a. Personal notice that it intends to take away such license.

b. Any prior statement, reason or specification of grounds for such proposed action.

c. Making of any record of such action which can be reviewed by a court of law.

d. The opportunity to present evidence under oath to show that he is entitled to the continued benefit of such license.

e. Cross-examine witnesses who make accusations questioning his good name, honor, reputation, morality and integrity.

3.

Do the provisions of Section 176.05(1) and 176.05(8) in granting local officials the power to deny the renewal liquor license by a legislative hearing without any standards or guidelines or opportunity for review violate the due process clause of the Constitution?

4.

Do the broad powers possessed by the State of Wisconsin in regulating liquor traffic include the power to deny the citizen the right to due process of law?

STATEMENT OF THE CASE

The appellees in these cases, Richard Misurelli and David Robers, are tavern owners in the City of Racine, Wisconsin. In June of 1971 they brought civil rights actions under Title 42 U.S.C. 1983 and Title 28 U.S.C. 1343 alleging that the City of Racine deprived them of their right to due process of law in refusing to renew their liquor license for the license year 1971-1972. That the action of the Racine officials was taken under color of the custom, usages and laws of the State of Wisconsin.

The plaintiffs' cause of action were for declaratory judgment that the Wisconsin liquor licensing statutes are unconstitutional and their prayers for relief were limited to temporary and permanent injunctive relief. Their

Amended Complaints challenged the constitutionality of the Wisconsin Statutes and requested the convening of a three-Judge District Court.

The facts in this case are undisputed and the case was submitted to the District Court on agreed and stipulated facts by all the parties.

Prior to June of 1971 the plaintiffs were owners and operators of tavern businesses in Racine, Wisconsin. The continued ownership and survival of their tavern businesses was dependent entirely upon the renewal of the liquor license for the year 1971 and 1972 beginning on July 1, 1972.

After a number of legislative hearings, on June 7, 1971, the Racine Common Council voted to deny the renewal of the liquor licenses of the plaintiffs for the year 1971-72. These legislative hearings were held pursuant to the authority granted to the Council by the Wisconsin Statutes.

The plaintiffs were not given any personal notice of such hearings. No specification of charges against granting of the licenses were made known to the plaintiffs prior to the vote to deny the licenses taken on June 7, 1971.

The hearings consisted of citizens speaking for or against the renewal of the license. No speakers were placed under oath nor were plaintiffs given opportunity to cross-examine the speakers. No transcript was ever made of what was said at the hearings or of the action taken by the City of Racine. A previously prepared and undisclosed written statement as to the reasons for denying plaintiffs' license was presented to the Racine Common Council just prior to their vote to deny on June 7, 1971.

The reasons given in the written report for the denial of the license were that the plaintiffs, Richard Misurelli and David Robers, by their method of operation during the prior year caused an "increase in prostitution, promiscuity and venereal disease in the City of Racine and made it

a city of ill-repute." This written report was printed and given extensive publicity in newspapers in Southeastern Wisconsin.

The appellees commenced civil rights actions under 42 U.S.C. 1983 and 28 U.S.C. 1343 alleging that the municipalities deprived them under color of the statutes and customs of Wisconsin of their right to due process of law under the Constitution and laws of the United States. Their complaints asked for declaratory judgment and injunctive relief.

To preserve the status quo, District Judge John W. Reynolds issued a temporary injunction ordering the cities to issue licenses to the appellees until further order of the Court. Judge Reynolds requested the convening of a three-Judge court since the appellees were in effect challenging the constitutionality of the Wisconsin Statutes.

In a Decision and Order entered on August 2, 1972, the three-Judge District Court found that insofar as the provisions of Sections 176.05(1) and 176.05(8) of the Wisconsin Statutes permit the denial of a renewal liquor license without a due process adversary hearing are unconstitutional. The decision is reported as *Misurelli* v. *City of Racine,* 346 F. Supp. 43.

The pertinent provisions of these statutes are:

> "176.05 Liquor licenses. (1) AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors.
>
> • • •

(8) ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

ARGUMENT

I.

DECISION FINDING WISCONSIN STATUTORY LICENSING PROCEDURE UNCONSTITUTIONAL UNDER DUE PROCESS CLAUSE CONSISTENT WITH DECISIONS OF THIS COURT.

From the earliest to its most recent decisions, this Court has insisted that due process of law is basic to our society and binding on the states where federally protected rights are involved.

The whole evolution of procedural due process has been in the direction requiring fair procedures where state action affects protected interests of a citizen. Where federal rights are involved due process commands that not only state procedure be adequate to insure a fair hearing but that it also provide adequate means for judicial review of federal claims. These safeguards are necessary to check arbitrary and lawless exertion of power and that a state will employ reasonable and civilized standards in its administration of laws that affect the lives of its citizens.

The principal purpose of the Due Process Clause is to insure that state power is exerted only pursuant to procedures adequate to vindicate individual rights. The extent and nature of these rights are delineated in the recent case of *Board of Regents* v. *Roth*, ... U.S. ....., 33 L. Ed. 548, 92 S. Ct. ..... (June 29, 1972):

> "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount.

'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew two well that only a stagnant society remains unchanged.' (Citations omitted) For that reason the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment) the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

In *Bell* v. *Burson*, this Court specifically rejected the privilege theory with respect to licenses issued by the states who have traditionally revoked such licenses summarily and without any hearing. Once such licenses are issued they become important rights or interests protected by due process requirements.

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are

not to be taken away without that procedural due process required by the Fourteenth Amendment. Sniadach v. Family Finance Corp. 395 U.S. 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969); Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' "

Bell v. *Burson,* 402 U.S. 535, 29 L Ed 90, 91 S Ct 1506 (1971)

The recipient of welfare payments similarly has a protected interest.

"Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are '"a privilege" and not a "right".' Shapiro v. Thompson, 394 US 618, 627 n 6, 22 L Ed 2d 600, 611, 89 S Ct 1322 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, . . ."

Goldberg v. *Kelly,* 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011

An individual has a protected interest in his good name and standing in the community. Where a state makes accusations affecting his integrity, reputation or morality, notice and an opportunity to be heard are essential.

"Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. Wieman v. Updegraff, 344 US 183, 191, 97 L Ed 216, 222, 73 S Ct 215. '(T)he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hard-

ships of a criminal conviction, is a principle basic to our society.' Anti-Fascist Committee v. McGrath, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (Frankfurter, J., concurring).

Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one."

Wisconsin v. *Constantineau,* 400 US 433, 27 L Ed 2d 515, 91 S Ct 507.

II.

JUDGMENT OF DISTRICT COURT IS IN ACCORD WITH ALL DECISIONS OF CIRCUIT COURTS.

A number of Circuit Courts have passed upon the precise question presented for review by the appellants. With one exception these courts have uniformly held that liquor licensing is subject to the requirements of due process applicable either to a new or renewal applicant for a license.

The leading case is *Hornsby* v. *Allen,* 326 Fed 2d 605 (5th Circ. 1964) which held that a new applicant for a liquor license was entitled to due process in the consideration of his application for such license.

". . . Since licensing consists in the determination of factual issues and the application of legal criteria to them—a judicial act—the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see Tadano v. Manney, 160 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see Opp Cotton Mills v. Administrator, 312 U.S. 126, 61

S. Ct. 524, 85 L. Ed. 624 (1941). Although strict adherence to the common-law rules of evidence at the hearing is not required, see Crowell v. Benson, 285 U.S. 22, 48, 52 S. Ct. 285, 76 L. Ed. 598 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L. Ed. 1129 (1938), to present evidence to support their contentions, see id. 304 U.S. at 18, 58 S. Ct. at 776, 82 L. Ed. 1129, and to cross-examine witnesses for the other side, Reilly v. Pinkus, 338 U.S. 269, 70 S. Ct. 110, 94 L. Ed. 63 (1949). Thus it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party.

The *Hornsby* case was approved and followed in *Barnes* v. *Merritt,* 428 Fed 2d 8 (5th Cir. 1970):

"According to Hornsby v. Allen, et al., 326 F. 2d 605 (5 Cir. 1964), rehearing denied 330 F. 2d 55, the lack of ascertainable standards is a violation of due process actionable under 28 U.S.C. § 1343(3). Although the facts in *Hornsby* are not identical to those in the instant case, the decision is applicable. In *Hornsby,* an application for a license to operate a retail liquor store in Atlanta, George, was denied by the Mayor and Board of Aldermen and the applicant brought suit under 28 U.S.C. § 1343 claiming that the denial violated due process in that she was afforded no hearing, knew of no standards which had to be met to obtain a license and was given no reason for the denial. The court held that the fundamental requirements of due process are applicable to the licensing process; and adherence to the principle of due process requires that prescribed standards be established by city officials."

The *Hornsby* case has been cited with approval by this Court noting that it dealt with liquor licensing in support of its decision that due process requires a hearing in public assistance cases. *Goldberg* v. *Kelly,* 397 U.S. 254, 262 n. 9, 90 S Ct 1011 25 L. Ed. 2d 287 (1969).

In an earlier decision of the Sixth Circuit in *Glicker* v. *Michigan Liquor Control Commission,* 160 F 2d 96 (1947) came to the same conclusion:

> "The ruling of the District Court cannot be sustained on principle that the regulation of the liquor tranffic by the State is in the exercise of its police power and therefore not subject to the constitutional restrictions referred to, although there are state decisions to that effect. It is well settled under the decisions of the U. S. Supreme Court that a state police regulation is, like any other law, subject to the equal protection clause of the Fourteenth Amendment. Atchison, Topeka & Santa Fe Railway v. Vosburg, 238 U.S. 56, 59, 35 S Ct 675, 59 L Ed 1119, L.R.A. 1915E, 953; Connolly v. Union Sewer Pipe Co., 184 US 540, 558, 559, 563, 22 S Ct 431, 46 L Ed 679; see also Asher v. Ingels, D.C., S.D.Cal., 13 F. Supp. 654, 658, 659, and cases there cited; Compare Giozza v. Teirnan, supra, 148 US 657, at page 662, 13 S Ct 721, 37 L Ed 599; Power Manufacturing Co. v. Saunders, supra, 274 US 490, 494, 47 S Ct 678, 71 L Ed 1165.
>
> We recognize the right of a state to regulate, or even prohibit, through the exercise of its police power the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment. Murphy v. California, 225 US 623, 32 S Ct 697, 56 L Ed 1229, 41 L.R.A., N.S., 153. But it is equally well settled that such regulation is not unlimited in scope, but is subject to the limitations imposed by that amendment. While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment, to prevent such regulation from being arbitrary or discriminatory. Allgeyer v. Louisiana, 165 US 578, 17 S Ct. 427, 41 L Ed 832; Adams v. Tanner, 244 US 590, 37 S Ct 662, 61 L Ed 1336, L.R.A. 1917F, 1163 Ann. Cas. 1917D, 973; Tyson & Brother United Theatre Ticket Officers v. Banton, 273 US 418, 47 S Ct 426, 71 L Ed 718, 58 A.L.R. 1236; Power Manufacturing Co.

v. Saunders, supra, 274 U.S. 490, 47 S Ct 678, 71 L Ed 1165; Frost v. Corporation Commission, supra, 278 U.S. 515, 49 S Ct 235, 73 L Ed 483. The rule is equally as applicable where the business or occupation being regulated is not a franchise or property right, but is merely a privilege granted or withheld by the state at its pleasure. Frost & Frost Trucking Co. v. Railroad Commission, 271 US 583, 591-594, 46 S Ct 605, 70 L Ed 1101, 47 A.L.R. 457."

Although dealing with a license to carry on fund raising campaigns, the Seventh Circuit case of *Adams* v. *Park Ridge,* 293 Fed. 2d 585 (1961) adopts the *Hornsby* rule that an applicant is entitled to due process before it is rejected:

". . . We find that the defendants' position in this respect vulnerable in view of the fact that the 1928 ordinance contains no definitive standards or other controlling guides governing the action of the City Council in granting or withholding a permit for charitable fund raising."

The appellants' appeal is based entirely on the Sixth Circuit decision in *Lewis* v. *City of Grand Rapids,* 356 F 2d 276 (1966) which is the only Circuit Court which has reached the opposite result. The court in the *Lewis* case was relying on an 1890 decision of this Court in *Crowley* v. *Christensen,* 137 US 86, 11 S Ct 13, 34 L Ed 620 holding that a license to sell or deal in liquor was a pure privilege revokable at the will of the legislature.

As we have already pointed out in our brief, the 'privilege' doctrine upheld in the *Lewis* and *Crowley* cases has been completely rejected by this Court in *Bell* v. *Burson,* supra, *Board of Regents* v. *Roth,* supra and *Goldberg* v. *Kelly, supra.* We quote from the *Roth* case at page 557:

". . . For that reason the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."

Moreover, this Court has in numerous decisions established that the regulation of the liquor traffic is not insulated from the precepts of due process. See *Wisconsin* v. *Constantineau,* supra, and *Goesaert* v. *Cleary,* 335 US 464, 69 S Ct 198, 93 L Ed 163.

III.

SERIOUS CHARGES MADE AGAINST APPELLEES REQUIRED DUE PROCESS BY RECENT DECISIONS OF THIS COURT.

In giving the reasons for the denial of the liquor license, the Racine officials made damaging accusations against Robers and Misurelli involving their personal integrity.

As is set forth in Appellants Appendix at page 115, the City of Racine denied Robers and Misurelli a license because their manner of doing business caused an increase in prostitution, venereal disease and promiscuity in the City of Racine and changed the reputation of the city to one of ill repute.

These accusations were never made known to Robers or Misurelli until after the Racine Common Council voted to deny their licenses. At no time were they ever given an opportunity to refute such charges. They were published extensively in newspapers in Southeastern Wisconsin. These charges certainly affected their honor and reputation in the community.

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(W)here a person's good name,

reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' "

Board of Regents v. *Roth*, ... U.S. ....., 33 L Ed 2d 548, 92 S Ct—(June 29, 1972)

IV.

WISCONSIN STATUTE UNCONSTITUTIONAL ON ITS FACE.

Section 176.05(1) of the Wisconsin Statutes contains the following delegation of power to local licensing bodies:

> "Each town board, village board and Common Council *may grant retail licenses, under conditions and restrictions of this chapter . . . to such persons entitled under this chapter as they deem fit . . .*"

Section 176.05(8) requires such boards to have annual license meetings from May 15 to June 15 of each year for the purpose of passing on such license.

This statute contains no provision whatsoever for notice or hearing to an applicant or holder of a liquor license. The local licensing body merely holds meetings for the purpose of passing on the license. Notice of these meetings are published in a newspaper or posted to the bulletin board of the City Hall. An applicant does not receive any personal notice of such meetings.

The statute contains no guidelines or standards to guide the Common Council in making its decision to grant or deny a license. The statute makes no provision that a record be made of these public meetings.

The case of the appellee, Jeanette Stenzel, sharply illustrates the arbitrary power possessed by the Common Council. Mrs. Stenzel has held a liquor license issued to her by the City of Kenosha for more than 20 years. She

has an investment in her tavern of considerably more than $20,000.00.

On June 7, 1971, the Kenosha Common Council voted to renew Mrs. Stenzel's license. At a later meeting held two weeks later, on June 21, 1972, the Council changed its mind and voted to deny her license. Mrs. Stenzel was given no notice that the City was going to reconsider her application nor was she present at the June 21 meeting. She first learned of the denial by its announcement in the newspapers the next day.

This Court has never sustained such a state statute that is so fundamentally inconsistent with the Due Process Clause of the Fourteenth Amendment. The statute grants local officials stark unguided and unreviewable power to give a license to whomever they please. The choice is left to the whim of the official—the very antithesis of due process and rule by law. *Seattle Trust Co.* v. *Roberge,* 278 US 116, 73 L Ed 210, 49 S Ct 50 (1928), *Yick Wo* v. *Hopkins,* 118 US 356, 30 L Ed 220, 6 S Ct 1064, *Wisconsin* v. *Constantineau,* supra.

In a number of decisions, the Wisconsin Supreme Court has upheld the constitutionality of these statutes interpreting them to permit local officials to deny a license by a legislative trial without any of the due process safeguards. We quote from its most recent decision in *State, ex rel Ruffalo* v. *Common Council of City of Kenosha,* 38 Wis. 2d 518, 157 N.W. 2d 568 (1968):

> "Ruffalo argues that upon renewal he is entitled to a trial-type hearing upon his application under the due-process clause of the constitution. *Hornsby* v. *Allen,* supra. However, the granting of a liquor license is a legislative function which does not require a trial-type hearing to comport with due process. From time immemorial, legislators and bodies exercising

the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. The right to a hearing and a record sufficient for judicial review to determine whether the exercise of the administrative power was capricious or arbitrary is fundamental."

V.

CONCLUSION

The decision of the District Court is in harmony with this Court's insistence that state action which affects substantial interests of a citizen in liberty or property be exercised within the due process procedural safeguards. Without such Federal supervision of Constitutional rights, state power would become nothing more than government by whim of the state officials wielding the power. As was said in *Marbury* v. *Madison,* 1 Cranch 137, 2d L Ed 60 (1803), ours is "termed a government of laws, not men."

Of critical importance in these cases is the fact that the District Court was not called upon to determine the adequacy or inadequacy of the Wisconsin liquor licensing procedure. In Wisconsin, the licensing of a tavern business is left entirely to the unguided and unreviewable discretion and whim of the Common Council or Town Board.

The appellees respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

VICTOR C. CAIRO
Attorney for Appellees,
Richard Misurelli,
Terrance McCue,
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